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# **'Regime shopping' across (blurring) boundaries**

*Mijke Houwerzijl*<sup>1</sup>

## **1. Introduction**

This chapter identifies and explores the (blurring) boundaries between the legal regimes for labour mobility across the EU in connection with what is sometimes called the scope for 'regime shopping'.<sup>2</sup> The central focus is on the distinction between movement of migrant workers and movement of posted workers.

In law on freedom of movement, several categories of transnational labour mobility can be distinguished. Two of these categories concern self-employed: self-employed EU nationals can either move across a border on a temporary basis by using the freedom to provide services in another Member State (Article 56 TFEU), or on a permanent basis, by using the freedom of establishment in another Member State (Article 49 TFEU). Regarding workers'<sup>3</sup> mobility, the picture is less straightforward. Up to seven categories of workers, further described below, can be traced who can move within the EU under – again – two regimes: the free movement of workers (Article 45 TFEU) and the free movement of services (Article 56 TFEU). Notably, the latter possibility cannot be traced in the text of Article 56 TFEU but originates in the case law of the Court of Justice of the EU<sup>4</sup> (hereinafter CJEU).<sup>5</sup>

To distinguish between movement of migrant workers under Article 45 TFEU and movement of posted workers under Article 56 TFEU, the CJEU developed the so-called 'labour market access test'. Other criteria that can be used to distinguish between the two regimes for workers' mobility can be found in the notions of what is temporary and what is habitual in the context of the Posting of Workers Directive<sup>6</sup> (hereinafter PWD) and the Rome I Regulation<sup>7</sup> (hereinafter Rome I). However, as will be shown, the use of these criteria does not result in a clear divide between the two regimes for workers' mobility.

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<sup>2</sup> See, for instance, Franz Traxler and Birgit Woitech, 'Transnational Investment and National Labour Market Regimes: A Case of 'Regime Shopping'?' (2000) 6 *European Journal of Industrial Relations* 141–159.

<sup>3</sup> Contrary to the British distinction between workers and employees, these two terms will be used synonymously in this chapter.

<sup>4</sup> And its predecessor the European Court of Justice (ECJ). The remainder of this chapter refers to the CJEU only.

<sup>5</sup> For a detailed account of this evolution see Chapter 2 of this book: Stein Evju and Tonia Novitz, 'The evolving regulation: dynamics and consequences'.

<sup>6</sup> European Parliament and Council Directive 96/71/EC of 16 December 1996 concerning the posting of workers in the framework of the provision of services [1997] OJ L18/1.

<sup>7</sup> European Parliament and Council Regulation (EC) 593/2008 of 17 June 2008 on the law applicable to contractual obligations (Rome I) [2008] OJ L177/6.

Exemplary is the special case of cross-border movement of temporary agency workers, which, according to a recent judgment of the CJEU, seems to fall under both regimes concurrently.

Whereas unclear legal criteria may facilitate the blurring of boundaries, they do not create it. Hence, the trigger for ‘regime shopping’ must be found somewhere else. Empirical findings, further discussed below, point to labour cost advantages as an important factor. In any event, the blurring of boundaries would never have become an issue if no difference in labour costs was attached to workers’ mobility under Article 45 TFEU, on one hand, and under Article 56 TFEU, on the other.

In my conclusion to this chapter, I plead for a slight resetting of the boundaries, boiling down to different treatment of the three forms of posting lumped together in the PWD. In my view, at least some posted workers should be treated as fully equal with national workers regarding working conditions and other rights at work, because they do not qualify (only) as posted workers but (also) as (temporarily moving) migrant workers.

The chapter is structured as follows. We begin with a sketch of how intra-EU labour mobility has evolved after enlargement (Section 2). Against this non-legal backdrop, Section 3 starts by examining the original setting of the boundaries between Article 45 and 56 TFEU and identifies the (original) categories of workers’ mobility under Article 45. Section 4 describes the shift in the original demarcation brought about by the well-known *Rush Portuguesa* judgment<sup>8</sup> and identifies the categories of labour mobility under Article 56 and Article 49 TFEU. Together, Sections 3 and 4 provide a detailed overview of the legal regimes and their boundaries. By outlining the rules determining the applicable labour law attached to these regimes, Section 5 shows why these legal boundaries matter in practice. From there, the focus shifts to the criteria which are or may be used to distinguish between the legal regimes, in law and in legal practice (in Section 6). In this context, attention is paid to the special, complicated case of temporary agency work (Section 7). Finally, a short excursion is made to the interplay between Article 45 and Article 56 regarding the position of posted workers under social security law (Section 8). The chapter ends with a summarizing conclusion on the problems encountered and possible solutions to reset or transcend the blurring boundaries between both regimes (Section 9).

## **2. Labour mobility within the enlarged EU**

Cross-border labour mobility within the EU used to consist of a comparatively small group of migrant workers, mainly frontier workers, who made use of their right to free movement enshrined in Article 45

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<sup>8</sup> Case C-113/89 *Rush Portuguesa v Office national d’immigration* [1990] ECR I-1417.

TFEU.<sup>9</sup> Facing the inflows of workers in recent years from new (EU8 and EU2<sup>10</sup>) into old Member States (EU15<sup>11</sup>), this image had to be revised. Despite the existence of transitional arrangements in most of the EU15,<sup>12</sup> demand factors, such as the demand for low-skilled and flexible labour, led to a steady increase of intra-EU labour mobility from new to old Member States. Also supply factors, such as the chance to improve living standards, were strong drivers behind (the size of) this trend. The enlargement of 2004 was unprecedented in terms of the number of states and people joining the EU. The twelve Member States that joined the EU in 2004 and 2007 represented almost 21 per cent of the EU27's population in 2007, some 103.3 million persons.<sup>13</sup> Compared with previous enlargements in the EU, there was also a larger gap than ever before in average wealth and minimum wage levels between new and old Member States.<sup>14</sup> At the accession date, the EU8 countries had attained only about one-third of average EU15 per capita income.<sup>15</sup> Measured in euros, the ratio of the lowest minimum wage level (Bulgaria) to the highest minimum wage level (Luxembourg) was 1:13 in 2009. Measured in purchasing power this ratio dropped to 1:6.<sup>16</sup> Levels of unemployment also played a role; for instance, in some Polish regions the unemployment rate in 2004 was above 20 per cent.<sup>17</sup> Hence, it comes as no surprise that studies on post-enlargement labour mobility patterns consider self-regulating supply and demand factors to be the decisive determinants of why people moved and for which kind of jobs they were recruited.<sup>18</sup>

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<sup>9</sup> Due to a decline in economic motivations, such as differences in wage levels, living standards and employment opportunities across EU Member States, the geographical mobility of EU citizens in the 1970s, 1980s and 1990s was lower than in the 1950s and 1960s. In 2002, only 600,000 people, or 0.4 per cent of the total employed population, worked in a country different from their country of residence. However, cross-border commuting was continuing to grow. See Report 'The Social Situation in the European Union 2002', 23. The last data for mobility within the EU15 showed that about 1.5 per cent of employed people (including legally residing third country nationals) within the EU15 moved in one year from another region *within* their Member State *or* from another Member State. See EC Press Release IP/04/267.

<sup>10</sup> The EU8 states are the Czech Republic, Poland, Slovakia, Hungary, Estonia, Latvia, Lithuania and Slovenia; the EU2 states are Bulgaria and Romania.

<sup>11</sup> The EU15 are those states that were EU members prior to 1 May 2004: Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, Sweden and the United Kingdom.

<sup>12</sup> Apart from Ireland, Sweden and the United Kingdom, all other EU15 states initially imposed transitional restrictions on the right to free movement of workers for citizens of the EU8. The citizens of the other two acceding states in May 2004 – Malta and Cyprus – were granted full free movement of workers because of the countries' small size and relative economic strength. For citizens of the EU2, transitional restrictions on the right to free movement of workers were imposed by all EU15 states except Finland and Sweden.

<sup>13</sup> Eurostat, *Europe in figures: Eurostat yearbook 2008* (Office for Official Publications of the European Communities, 2008) 23.

<sup>14</sup> According to a press release of the European Commission in 2003, 'average GDP per head in the EU would fall by 13 per cent in EU25 or by 18 per cent in EU27'. See IP/03/265.

<sup>15</sup> Daniel Vaughan-Whitehead, *EU Enlargement versus Social Europe? The Uncertain Future of the European Social Model* (Edward Elgar, 2003) 419–422; J. Kvist, 'Does EU enlargement start a race to the bottom? Strategic interaction among EU member states in social policy' (2004) 14 *Journal of European Social Policy* 301–318.

<sup>16</sup> Thorsten Schulten, 'Minimum wages in Europe: new debates against the background of economic crisis' (2009) ETUI Policy Brief Issue 2 European Economic and Employment Policy 2.

<sup>17</sup> Eurostat, *Regions: Statistical yearbook 2005* (Office for Official Publications of the European Communities, 2005) 68.

<sup>18</sup> Kristof Tamás and Rainer Münz (with a contribution by Elmar Hönekopp), *Labour Migrants Unbound? EU Enlargement, Transitional Measures and Labour Market* (Institute for Futures Studies Stockholm, 2006); European Commission, *Report on the Functioning of the Transitional Arrangements set out in the 2003 Accession Treaty (period 1 May 2004–30 April 2006)*, COM(2006) 48 final; Martin Kahanec, Klaus F Zimmermann (eds), *EU-labor markets after post-enlargement migration* (Springer-Verlag 2010).

Nonetheless, the transitional restrictions undeniably influenced the places where most workers went.<sup>19</sup> In exploring their opportunities to move to EU15 countries with transitional restrictions, EU8/EU2 workers often seem to have opted for ‘diversification strategies’.<sup>20</sup> Part of the available low-skilled labour has moved to the desired country of destination through illegal channels or even by ‘grey’ use of legal routes meant for non-economically active migrants, such as the family migration or student route.<sup>21</sup> Others went abroad through alternative legal routes, namely as posted workers or (bogus) self-employed.<sup>22</sup> Some workers seem to have switched between the different channels for work during their stay in the EU15.

Regime shopping or switching was attractive for the supply side because the routes to move as a posted worker or self-employed were not restricted. With regard to the freedom to provide services (Art. 56 TFEU) and of establishment (Art. 49 TFEU) no transitional arrangements were agreed upon in the Accession Treaties.<sup>23</sup> For the demand side, these routes also proved attractive. Notably, only a hard core of labour standards may apply mandatorily during the temporary posting in the host country.<sup>24</sup> Next to this, the posted worker stays insured under the social security schemes in the sending state.<sup>25</sup> When

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<sup>19</sup> According to a recent study commissioned by the European Commission, there is clear evidence that the pattern of transitional restrictions in place at the beginning of the 2004 enlargement diverted mobile workers away from traditional destinations – namely Germany – and towards the more easily accessed labour markets in the United Kingdom and Ireland. The research findings also suggest that, due to network effects, transitional arrangements can have permanent effects on the pattern of migration. See Dawn Holland and others, *Labour mobility within the EU. The impact of enlargement and the functioning of the transitional arrangement*, National Institute of Economic and Social Research, London, 2011, <http://ec.europa.eu/social/main.jsp?langId=en&catId=89&newsId=1108&furtherNews=yes> (accessed 13 August 2012).

<sup>20</sup> Support for this stance is provided by socio-legal studies such as the dissertation of Samantha Currie, *Migration, work and citizenship in the enlarged European Union* (Ashgate 2008) and the dissertation of Cathelijne Pool, *Migratie van Polen naar Nederland in een tijd van versoepeling van migratieregels* (Bju 2011). Based on qualitative interviews with various key-actors in the field, both studies highlight tangible experiences of Polish migrant workers in, respectively, the United Kingdom and the Netherlands and show how the legal framework and the formal status they are granted shapes their attitudes and experiences. The term ‘diversification strategies’ is from Hein de Haas, ‘The Determinants of International Migration’ (2011) IMI Working Papers Series 32, University of Oxford <<http://www.imi.ox.ac.uk/pdfs/imi-working-papers/wp-11-32-the-determinants-of-international-migration>> accessed 13 August 2012.

<sup>21</sup> Martin Ruhs and Bridget Anderson, ‘Semi-compliance and illegality in migrant labour markets: an analysis of migrants, employers and the state in the UK’ (2010) 16 *Population, Space and Place* 195–211.

<sup>22</sup> See the recent study commissioned by the European Commission of Aukje van Hoek and Mijke Houwerzijl, Comparative study on the legal aspects of the posting of workers in the framework of the provision of services in the European Union (Radboud University Nijmegen, 2011), especially Annex I. [ec.europa.eu/social/BlobServlet?docId=6677&langId=en](http://ec.europa.eu/social/BlobServlet?docId=6677&langId=en) (accessed 13 August 2012). The choice for illegality was observed by the Bureau of European Policy Advisers and the Directorate-General for Economic and Financial Affairs), ‘Enlargement, Two Years After: An Economic Evaluation’, European Economy Occasional Paper 24, (European Commission, 2006). [http://ec.europa.eu/economy\\_finance/publications/publication7548\\_en.pdf](http://ec.europa.eu/economy_finance/publications/publication7548_en.pdf) (accessed 13 August 2012).

<sup>23</sup> Austria and Germany, however, were entitled to impose transitional restrictions on EU8 nationals concerning the freedom to provide services in certain sectors because of the potential for serious labour market disturbances in sensitive sectors, such as construction and industrial cleaning.

<sup>24</sup> Pursuant to Art. 3 of the PWD. For more details see below section 3.5 and extensively Evju and Novitz (n 5) Section 9.\*

<sup>25</sup> Pursuant to Art. 12 of Regulation 883/2004 on the coordination of national social security systems, which deals with the issue of affiliation to a social security system in case of movement to another Member State. In principle, during the first 24 months of posting, the worker remains affiliated to the social security system of the Member State where he normally works.

posted from 'low wage' to 'high wage' countries, this<sup>26</sup> makes posted workers (far) less costly than locally hired workers. Nevertheless, posted workers can still be 'beaten' on cost by transnational self-employed. Moving under the legal status of a self-employed entails giving up all labour law protection and (most) social security law protection.

It is important to note that the majority of EU8 and EU2 workers did not find these alternative opportunities to (il)legally move abroad on their own. In fact, high demand for 'cheap labour' on the demand side, combined with scarce information about possibilities to move on the supply side, seems to have encouraged the reliance on migration facilitators, ranging from bona fide temporary agencies and subcontractors to middlemen and gangmasters operating in the shadow economy.<sup>27</sup>

For the demand side, the intermediaries take care of administrative formalities and other 'employer' responsibilities, if any,<sup>28</sup> and seek to gain maximal profit from the wage gap between EU8/EU2 countries and the EU15. The abundant supply of 'cheap labour' made available by the intermediaries has also been a significant driver of ever fiercer wage competition in labour-intensive sectors such as road transport, construction, agriculture, fish and meat processing, hospitality and temporary employment agencies.<sup>29</sup>

For the supply side, these intermediaries provide the logistical infrastructure and access to the foreign labour markets/user companies, and control the contract terms. Workers tend to depend on them not only for work but also for housing, medical insurance and so on during their stay in the host country. Arguably, this in turn has had the effect of increasing the likelihood that workers will find themselves in precarious or exploitative employment relationships.<sup>30</sup> Notions of precariousness and exploitation must be put in perspective, however: labour conditions below the prevailing standards in the host country may still be acceptable for the (illegal) workers concerned if set against the terms and conditions they are used to in their country of origin.<sup>31</sup> At the same time, they represent a controversial undercutting of labour standards on the labour market of the host country.

The continuing trend to use 'cheap labour' from new Member States has fuelled resistance against social dumping. Now that alternative regimes for labour mobility have been discovered, and, from a cost

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<sup>26</sup> Note that there may also be fiscal cost advantages attached to posting. Taxation of workers lies within the competence of Member States. Bilateral agreements exist between most Member States in order to avoid double taxation. These agreements set out the rules according to which taxes must be paid either in the country of residence of the worker or in the country of posting. Normally, for posting up to 183 (calendar) days income taxes are paid in the country of residence of the worker. In case of posting beyond 183 days income tax has to be paid in the country where the worker is posted.

<sup>27</sup> Jan Cremers, Jon Erik Dølvik and Gerhard Bosch, 'Posting of workers in the single market: attempts to prevent social dumping and regime competition in the EU' (2007) 38 *IRJ* 524–541.

<sup>28</sup> Depending on the specific legal, grey or black route chosen.

<sup>29</sup> See for the Netherlands HM ter Beek and others, Poolshoogte. Onderzoek naar juridische constructies en kostenvoordelen bij het inzetten van Poolse arbeidskrachten in drie sectoren (Regioplan Beleidsonderzoek 2005); MC Versantvoort and others, Evaluatie werknemersverkeer MOE-landen (ECORYS 2006).

<sup>30</sup> Sometimes even resulting in situations that may be labelled 'human trafficking' and/or 'forced labour'. For the United Kingdom see Currie (n 20) Chapter 3. However, there are also positive assessments of the role of (bona fide) intermediaries in the popular press. See Van Hoek/Houwerzijl 2011 (n 22).

<sup>31</sup> Van Hoek/Houwerzijl (n 22).

perspective, have become even more attractive after the rulings of the CJEU in the *Laval* quartet,<sup>32</sup> the use thereof will not stop once the last transitional restrictions on workers' freedom to move (for Bulgarian and Romanian workers) will be lifted.<sup>33</sup> On the contrary, there seems to be a growing market for cross-border subcontracting with the use of 'cheaper' posted workers, which is facilitated in particular by the *Rüffert* judgment. The (perceived threat of) social dumping that comes along with it provides a source of political tensions, especially in times of economic downturn. The scapegoating of Polish workers by the PVV hotline in the Netherlands is a recent and radical example of it.<sup>34</sup> Expressions such as 'British jobs for British workers' basically address the same logic of *ressentiment*.<sup>35</sup>

Against this non-legal backdrop<sup>36</sup> of commercial interest and societal unease with labour-cost driven mobility of workers, we will now turn to the legal framework of intra-EU labour movement.<sup>37</sup>

### 3. Original setting: all workers move under Article 45 TFEU

As already mentioned, if EU nationals qualify as employees, they may move to another Member State for work by using their right enshrined in Article 45 TFEU. The employer can also post his employees to another Member State by using Article 56 TFEU. If EU nationals are self-employed, Article 49 TFEU and Article 56 TFEU enable them to move freely within the EU. Below and in Section 4, the specific categories of labour mobility governed by the three free movement regimes are identified.

#### 3.1 The original demarcation line between Article 45 and Article 56 TFEU<sup>38</sup>

We start at the beginning of the EU integration process. In the early 1960s, before the opening of the 'common market' in 1970, the content of the four freedoms (of workers, services, establishment and goods) had to be defined. In these days, as a main rule it was stipulated that all workers, whether permanently or temporarily moving to another Member State, fell under the free movement of

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<sup>32</sup> This is used here as a joint denomination for the decisions in the following four cases: Case C-438/05 *Viking* [2007] ECR I-10779; Case C-341/05 *Laval un Partneri* [2007] ECR I-11767; Case C-346/06 *Rüffert* [2008] ECR I-1989; Case C-319/06 *Commission v Luxembourg* [2008] ECR I-4323.

<sup>33</sup> Ultimately on 1 January 2014, all transitional restrictions in the Member States must be lifted.

<sup>34</sup> This provoked a statement of Commissioner Viviane Reding on (and against the content of) the PVV's website <[http://ec.europa.eu/commission\\_2010-2014/reding/multimedia/news/2012/02/20120211\\_en.htm](http://ec.europa.eu/commission_2010-2014/reding/multimedia/news/2012/02/20120211_en.htm)> accessed 13 August 2012 and a European Parliament resolution of 15 March 2012 on discriminatory internet sites and government reactions (2012/2554(RSP)).

<sup>35</sup> See Catherine Barnard, 'British Jobs for British Workers. The Lindsey Oil Refinery Dispute and the Future of Local Labour Clauses in an Integrated EU Market' (2009) 38 *ILJ* 245-277; Claire Kilpatrick, 'British Jobs for British Workers? UK Industrial Action and Free Movement of Services in EU Law' (2009) LSE Working Paper 16 <<http://ssrn.com/abstract=1424662>> accessed 13 August 2012.

<sup>36</sup> For more details, see Chapter 5 of the present volume: Jon Erik Dølvik, Line Eldring and Jelle Visser, 'Setting Wage Floors in Open Markets - Europe's Multilevel Governance in Practice'. See also Jimmy Donaghey and Paul Teague, 'The free movement of workers and social Europe: maintaining the European ideal' (2006) 37 *IRJ* 652-666.

<sup>37</sup> For a discussion of the general foundations and perspectives of free movement rules and their relation to fundamental rights, see Chapter 4 of this book: Catherine Barnard, 'Free Movement and Labour Rights: Squaring the Circle?'

<sup>38</sup> On this subject see also Evju and Novitz (n 5) section 3.2.

workers.<sup>39</sup> Hence, all forms of workers' mobility of EU nationals were lumped together under the free movement of workers. Nonetheless, it was also acknowledged from the very beginning that the law on the free provision of services may interfere with the law on the free movement of workers.<sup>40</sup> Such a tension can be seen, in particular, in situations where an employer exercises his right to provide a cross-border service. Provision of services often involves employees who carry out the tasks. Therefore, cross-border provision of services often means that the service provider may want to post his employees temporarily to the Member State where the service is provided (hereinafter 'host Member State'). In secondary legislation based on the freedom to provide services, the following standard sentence, referring to the free movement of workers, used to be included in the Preamble:

Whereas the position of paid employees accompanying a person providing services or acting on his behalf will be governed by the provisions laid down in pursuance of Articles 48 and 49 of the Treaty (now Articles 45 and 46 TFEU).<sup>41</sup>

To make sure that a cross-border service provider would not be denied the right to post his workers to the host Member State, a special provision was laid down in Article 6(3) of Directive 68/360/EEC, based on the free movement of workers, which reads as follows:

Where a worker is employed for a period exceeding three months but not exceeding a year in the service of an employer in the host State or in the employ of a person providing services, the host Member State shall issue him a temporary residence permit, the validity of which may be limited to the expected period of the employment.<sup>42</sup>

Hence, in this original approach the status of the employing company – as cross-border service provider – was separated from the status of the posted worker.

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<sup>39</sup> Evidenced by the texts and scope of Council Regulations 1612/68 on freedom of movement for workers within the Community (now replaced by European Parliament and Council Regulation 492/2011), Council Regulation 1408/71 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community (now replaced by European Parliament and Council Regulation 883/2004 on the coordination of social security systems) and old Council Directive 68/360 on the abolition of restrictions on movement and residence within the Community for workers of Member States and their families (now replaced by European Parliament and Council Directive 2004/38 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States). See also M.S. Houwerzijl, *De Detacheringsrichtlijn. Over de achtergrond, inhoud en implementatie van Richtlijn 96/71/EG* (Kluwer 2005) 31-32; M.S. Houwerzijl, 'Towards a more effective posting directive' (2006) 58 *Bulletin of Comparative Labour Relations* 179-198.

<sup>40</sup> See D. Vignes, 'Le droit d'établissement et les services dans la C.E.E.' (1961) 7 *Annuaire Français de Droit International* 674-675; U. Everling, *Das Niederlassungsrecht im Gemeinsamen Markt* (Verlag Franz Vahlen Berlin 1963) 72-73.

<sup>41</sup> Cited from old Council Directive 64/429/EEC (now repealed) concerning the attainment of freedom of establishment and freedom to provide services in respect of activities of self-employed persons in manufacturing and processing industries falling within ISIC Major Groups 23-40 (Industry and small craft industries). For an overview of the other Directives that contain this sentence, see Houwerzijl 2005 (n 38) 35.

<sup>42</sup> This Article must be read in conjunction with Article 8(1)(a) of Dir. 360/68 stipulating that: Member States shall, without issuing a residence permit, recognise the right of residence in their territory of: (a) a worker pursuing an activity as an employed person, where the activity is not expected to last for more than three months. The document with which the person concerned entered the territory and a statement by the employer on the expected duration of the employment shall be sufficient to cover his stay; a statement by the employer shall not, however, be required in the case of workers coming within the provisions of the Council Directive of 25 February 1964 on the attainment of freedom of establishment and freedom to provide services in respect of the activities of intermediaries in commerce, industry and small craft industries.



## 3.2 Categories of workers governed by Article 45 TFEU

Already in its early case law the CJEU insisted that the definition of a ‘worker’ is a matter for EU law, not national law. To qualify as a worker exercising a right to free movement under Article 45 TFEU, and thus be eligible for the right not to be discriminated against as regards employment, remuneration and other conditions of work and employment, one must be classified as undertaking effective and genuine work, under the direction of an employer, for which one receives remuneration.<sup>43</sup> Elaborating upon Article 45 TFEU, recital 5 of Regulation 1612/68 (now replaced by Regulation 492/2011) established that such a right should be enjoyed without discrimination by four categories of workers:<sup>44</sup>

- (1a) permanent workers;
- (1b) seasonal workers;
- (1c) frontier workers;
- (1d) workers who pursue their activities for the purpose of providing services.

Remarkably, by continuing the reference to this latter category in the current Regulation 492/2011, the EU legislator still seems to uphold the message that these rules ‘undoubtedly extend to protect workers of suppliers of services’.<sup>45</sup> Indeed, it cannot be denied that posted workers ‘undertake effective and genuine work, under the direction of an employer, for which one receives remuneration’. However, it is unclear how such an approach can be reconciled with the decision in *Rush Portuguesa* which gave posted workers their well-known ‘*status aparte*’.

## 4. Resetting the boundaries: posted workers move under Article 56 TFEU

In its landmark ruling in the case *Rush Portuguesa* in 1990, the Court established that Article 56 TFEU allows an EU-based service provider to move to another Member State with his own labour force, which he brings from the state where they normally work, even if these workers do not have the right to move under Article 45 TFEU. *Rush Portuguesa* was a Portuguese employer that temporarily employed 58 of its own Portuguese workers for a construction assignment on French territory. Given the French transitional provisions the free movement of workers did not yet apply to Portugal, a new member of the EU at the time. Therefore, Portuguese nationals were, at the relevant time, in a similar position to third country nationals. In light of this, the French immigration office

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<sup>43</sup> Case 66/85 *Lawrie-Blum* [1986] ECR 2121; Case 196/87 *Steymann* [1988] ECR 6159.

<sup>44</sup> However, no reference is made to what may be seen as yet another category of workers, namely those with jobs involving international mobility, such as international transport workers (truck drivers, flight crews, railway personnel, seamen). In the framework of Regulation 883/2004 on the coordination of social security systems, these workers are ‘caught’ by the category ‘working simultaneously in two or more countries’. This category will be left out of the survey, because it does not play an essential role in the (blurring) boundaries between the legal regimes. See on the specific case of international transport Aukje van Hoek and Mijke Houwerzijl, “‘Posting’ and “‘posted workers’” – The need for clear definitions of two key concepts of the Posting of Workers Directive’ (2012) CYELS forthcoming, especially section 6.1.

<sup>45</sup> As stated by AG Van Gerven, para 14 of his Opinion in Case C-113/89 *Rush Portuguesa* [1990] ECR I-1417.

tackled *Rush* because its workers were staying in France without work permits. The CJEU, however, confirmed the stance held by *Rush Portuguesa* that no work permit could be requested for the employment of posted workers in France who ‘return to their country of origin after the completion of their work without at any time gaining access to the labour market of the host Member State.’<sup>46</sup> Hence, the revolutionary aspect of the ruling was that third country nationals<sup>47</sup> who do not have the right to freely move to another EU country to work without a work permit, acquired a right to movement derived from their employer, albeit a limited one.<sup>48</sup>

## 4.1 Categories of workers governed by Article 56 TFEU

Since *Rush Portuguesa*, the concept of the free provision of services was to be interpreted as covering a situation in which there is a temporary movement of workers who are sent to another Member State to carry out work as part of a provision of services by their employer. In later case law it was confirmed that the principle of freedom of movement for workers would not be involved in the event that posted workers return to their country of origin after the completion of their work without at any time gaining access to the labour market of the host Member State.<sup>49</sup> Regarding the interests of the settled workforce in the host state and national systems of labour law, the CJEU had stated in *Rush Portuguesa* that ‘Community law does not preclude Member States from extending their legislation, or collective labour agreements entered into by both sides of industry, to any person who is employed, even temporarily, within their territory, no matter in which country the employer is established.’<sup>50</sup> In 1996, this paragraph 18 of the *Rush Portuguesa* judgment was codified and elaborated upon by the PWD, legally based exclusively on the freedom to provide services.

Article 1(3) PWD defines three categories of posting which may in fact be read as subcategories of the, nowadays ignored, category 1d above:

- (2a) posted workers by service providers (subcontractors);

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<sup>46</sup> *Rush Portuguesa*, para 15.

<sup>47</sup> If legally residing and regularly employed in a Member State. See Case C-43/93 *Vander Elst* [1994] ECR I-3803.

<sup>48</sup> In this chapter, the position of third country national workers will not be dealt with in further detail. I refer to Chapter 10, Petra Herzfeld Olsson, ‘Giving to those who have and taking from those who have not – the development of an EU policy on workers from third countries’.

<sup>49</sup> Case C-43/93 *Vander Elst* [1994] ECR I-3803; Case C-49/98 et seq. *Finalarte* [2001] ECR I-7831; Case C-445/03 *Commission v Luxembourg* [2004] ECR I-10191; Case C-244/04 *Commission v Germany* [2006] ECR I-885; Case C-168/04 *Commission v Austria* [2006] ECR I-9041.

<sup>50</sup> *Rush Portuguesa*, para 18, with reference to Joined Cases 62/81 and 63/81 *Seco SA and Another v EVI* [1982] ECR 223 and confirmed subsequently, albeit amended with the crucial restriction to minimum wages, by Cases *Vander Elst*, C-272/94 *Guiot* [1996] ECR I-1905, Cases C-369/96 and C-376/96 *Arblade and Leloup* [1999] ECR I-8453, Case C-165/98 *Mazzoleni* [2001] ECR I-2189, Case C-49/98 et seq. *Finalarte* [2001] ECR I-7831, Case C-164/99 *Portugaia* [2002] ECR I-787.

- (2b) intraconcern posted workers;
- (2c) posted workers via intermediaries such as temporary work agencies (TWA).<sup>51</sup>

The position of posted workers is characterized by the fact that they maintain their employment relationship with their own employer established in another Member State during the posting in the host Member State. As a rule, the employment contracts of posted workers are governed by the law of their habitual country of work instead of that of the host country. This contractual perspective reveals an important aspect of the legal position of the posted worker: the employment contract of a posted worker is typically influenced by more than one legal system, as the employment contract is concluded in one Member State (home state) and the performance of the service takes place in another Member State (host state). Here the interface with private international law comes into play, as we will discuss in Section 5 below.<sup>52</sup>

## 4.2 Self-employed persons governed by Article 56 TFEU

As can be derived directly from the text of Article 56 TFEU, the main category of labour mobility governed by this freedom concerns self-employed EU nationals. They may move temporarily as:

- (2d) service providers.

Whether a provision of services falls within the scope of Art. 56 TFEU depends (pursuant to Art. 57 TFEU) on the nature of the services which must be economic (commercial), in the sense that they must be provided for remuneration. A person may rely on the free movement of services in order to temporarily pursue his activities in the Member State where the service is provided under the same conditions as imposed by the host state on its own nationals. Furthermore, Article 57 TFEU stipulates that the free movement of services is residual to the other fundamental freedoms.<sup>53</sup> According to the TFEU when distinguishing between the three regimes, only when a situation cannot fall under the freedom of establishment or the freedom to move as a worker will it be governed by the free movement of services.

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<sup>51</sup> More precise as stipulated in Article 1(3) PWD: the PWD applies to undertakings which, within the framework of the transnational provision of services, post workers to the territory of a Member State, provided there is an employment relationship between the undertaking making the posting and the worker during the period of posting: (1) on their account and under their direction, under a contract concluded between the undertaking making the posting and the party for whom the services are intended; (2) to an establishment or to an undertaking owned by the group; (3) as a temporary employment undertaking, to a user undertaking.

<sup>52</sup> See for more details Section 5. On the private international law (conflict of laws) dimension, see also Evju and Novitz (n 5) section 3.3.

<sup>53</sup> Reading as follows: 'Services shall be considered to be "services" within the meaning of the Treaties where they are normally provided for remuneration, *in so far as* they are not governed by the provisions relating to freedom of movement for goods, capital and persons' (authors' emphasis)].

### 4.3 Self-employed persons governed by Article 49 TFEU

Self-employed EU nationals may permanently settle in another country by using the freedom of establishment enshrined in Art. 49 TFEU. As interpreted by the CJEU, the concept of establishment is a very broad concept, allowing an EU national to participate as a self-employed on a stable and continuous basis in the economic life of another Member State than his state of origin and to profit therefrom, so contributing to economic and social interpenetration within the EU.<sup>54</sup> It has been defined as the right to take up and pursue economic activities as a self-employed person and to set up and manage undertakings which this person effectively controls, under the same conditions as are laid down by the law of the Member State of establishment for its own nationals.<sup>55</sup> Hence, Article 49 TFEU prohibits the Member States from laying down in their laws conditions for the pursuit of activities by persons exercising their right of establishment which differ from those laid down for its own nationals.<sup>56</sup>

### 4.4 Overview of the categories of labour mobility

To sum up, four categories of labour mobility governed by (1) Article 45 TFEU were identified above, followed by four categories of labour mobility governed by (2) Article 56 TFEU and one category of labour mobility governed by (3) Article 49 TFEU:

- (1a) permanent workers;
- (1b) seasonal workers;
- (1c) frontier workers;
- (1d) those workers who pursue their activities for the purpose of providing services;
  
- (2a) workers posted by their employer in the context of subcontracting processes;
- (2b) workers posted intraconcern;
- (2c) agency workers posted via intermediaries such as TWAs;
- (2d) ‘posted’ self-employed service-providers;

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<sup>54</sup> See Case 2/74 *Reyners* [1974] ECR 631, para 21; Case C-386/04 *Centro di Musicologia Walter Stauffer* [2006] ECR I-8203, para 18 and the case-law cited.

<sup>55</sup> See, to that effect, Case C-212/97 *Centros* [1999] ECR I-1459, para 19, and Case C-170/05 *Denkavit Internationaal and Denkavit France* [2006] ECR I-11949, para 20.

<sup>56</sup> Case 270/83 *Commission v France* [1986] ECR 273, para 24. As confirmed in Case C-161/07 *Commission v Austria* [2008] ECR I-10671, para 28.

- (3) permanent self-employed.

From this categorization exercise a picture emerges of ‘permanent’ and ‘temporary’ categories of labour mobility. Two of these categories concern self-employed (2d and 3) and will not be further examined. Regarding the seven distinguished categories of workers’ mobility it should be noted that category 1d overlaps with categories 2a, 2b and 2c. In reality, there are only six categories. Before exploring the criteria in terms of which the identified categories of workers’ mobility governed by Article 45 and Article 56 TFEU can be distinguished from each other, we will first turn to the applicable labour law attached to both regimes. As established in Section 2, it is the difference in labour costs that provides the impetus for ‘shopping’ across the blurring of boundaries between both regimes. Therefore, it is important to know how this is legally underpinned.

## 5. Applicable labour law

### 5.1 ‘Article 45’ movement of workers

Let us first of all turn again to the free movement of workers. By granting entitlement to EU nationals to access the labour markets of the other Member States these provisions are meant to be the main source (the ‘cornerstone’) of EU labour movement to another Member State. Pursuant to Article 7 of Regulation 492/2011, EU nationals who move as employees to another Member State are entitled to equal treatment with national workers as regards remuneration, dismissal, other labour conditions in law, laid down in collective or individual agreement or any other collective regulation and, should they become unemployed, reinstatement or re-employment, access to training in vocational schools and retraining centres, and the same social and tax advantages.

Workers moving under Article 45 TFEU will also be able to utilise the provisions on the aggregation and exportability of social security benefits under Regulation 883/2004. Moreover, the case law of the CJEU on ‘social advantages’ pursuant to Article 7(2) of Regulation 492/2011, has made a broad type of welfare benefit<sup>57</sup> available to workers based on a broad concept of a worker including those working part-time, those carrying out work that falls below a state’s minimum subsistence level and those claiming benefits in conjunction with working.<sup>58</sup>

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<sup>57</sup> There is an abundance of case law on the issue of ‘social advantages’ in which it was stressed that the concept should be interpreted broadly: Case 207/78 *Even* [1979] ECR 2019. ‘Social advantages’ has been held to include discretionary benefits: Case 65/81 *Reina* [1982] ECR 33, and benefits granted after employment has been terminated: Case C-57/96 *Meints* [1997] ECR I-6689. Case 32/75 *Fiorini v SNCF* [1975] ECR 1085. It also covers benefits not directly linked to employment, such as a right to be accompanied by an unmarried partner: Case 59/85 *Netherlands v Reed* [1986] ECR 1283. Hence, it has come to be understood as referring to almost any form of social welfare available to the state’s own nationals. See also Article 9 Regulation 492/2011 (housing).

<sup>58</sup> See Case 53/81 *Levin*; Case 139/85 *Kempf*; Case C-357/89 *Raulin*.

## 5.2 ‘Article 56’ movement of workers

The PWD coordinates Member States’ legislation in such a way as to provide a core of mandatory rules on minimum protection with which employers who post workers to the Member State in which the service is to be provided must comply in the host country. This is laid down in Article 3 of the PWD. Article 3(1) states that Member States are to ensure that undertakings falling within the scope of the PWD guarantee workers posted to their territory the terms and conditions of employment laid down by mandatory law including collective agreements which have been declared universally applicable insofar as they concern the construction sector referred to in the Annex of the PWD. This equal treatment principle concerns the duration of the work, rest periods and holidays, minimum rates of pay, health, safety and hygiene at work, the conditions of hiring-out of workers, protective measures for pregnant women, for women who recently gave birth, for young people and children, and equality of treatment between men and women. Hence, Article 3(1) PWD determines the nature of the labour standards that the Member States must apply but not the substance of these standards.

According to Article 3(10) first indent of the PWD, the host Member States may add public policy provisions on other subjects than those explicitly listed in art. 3(1) PWD. This was part of the delicate political compromise needed to get the PWD adopted.<sup>59</sup> We know now that the CJEU, with the judgment in *Commission v Luxembourg*, has chosen a restrictive interpretation of this provision, by cutting back the margin of appreciation the Member States have in defining what is to be understood under public policy. The CJEU has pointed out that the concept of public policy, first, comes into play where a genuine and sufficiently serious threat affects one of the fundamental interests of society and, second, must, as a justification for a derogation from a fundamental principle of the Treaty, be narrowly construed.<sup>60</sup>

## 5.3 Role of Private International Law (hereinafter PIL)<sup>61</sup>

Importantly, whereas equal treatment between (migrant/posted) workers and domestic workers is stipulated within the framework of the free movement law, this exists only in interaction with and can in practice be limited by the law of conflicts. Because of the private law character of the employment contract between employer and employee, parties are in principle free to choose the law applicable to their employment contract. However, in order to protect the employee, Article 8(1) Rome I (previously Article 6 of the Rome Convention<sup>62</sup>) limits the effect of such a choice

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<sup>59</sup> See Evju and Novitz (n 5) section 3.91.

<sup>60</sup> See Case C-319/06 *Commission v Luxembourg* [2008] ECR I-4323, para 50 and also Case C-355/98 *Commission v Belgium* [2000] ECR I-1221, para 28; Case C-465/05 *Commission v Italy* [2007] ECR I-11091, para 49.

<sup>61</sup> See in more detail Van Hoek and Houwerzijl (n 44).

<sup>62</sup> In 1980, the Member States signed the Convention on the Law Applicable to Contractual Obligations (the ‘Rome I Convention’). The Convention came into effect as of 1991 in most Member States. Articles 6 and 7 contain rules for international employment contracts. However, (employment) contracts signed after 17 December 2009, must

of law since it may not have the result of depriving the employee of the protection afforded to him by provisions that cannot be derogated from under the law applicable in absence of such a choice. Hence, it is always relevant to ascertain the latter law, which can be done following the choice of law rules in Article 8(2)-8(4) Rome I.

In the absence of a choice of law by the parties, Article 8(2) submits the individual contract of employment to ‘the law of the country in which or, failing that, *from which*<sup>63</sup> the employee habitually carries out his work in performance of the contract. Additionally, it states that the country where the work is habitually carried out shall not be deemed to have changed if the employee is temporarily employed in another country. Hence, in case of postings, Article 8(2) Rome I subjects the individual contract of employment only to the law of the habitual place of work. This will in most situations be the country of origin of both worker and employer.<sup>64</sup> If the place of work is undetermined or changes so frequently as not to allow the identification of a place where or from which the work is habitually performed, than Article 8(3) Rome I comes into play. Under Article 8(3) ‘the contract shall be governed by the law of the country where the place of business through which the employee was engaged is situated’.<sup>65</sup> Pursuant to Article 8(4), in all cases another law may be applied where it appears from the circumstances as a whole that the contract is more closely connected with a country other than that indicated in Article 8(2) or 8(3).<sup>66</sup>

The rules on mandatory protection laid down in the PWD can be understood to form an application of Article 9 Rome I. The Preamble to the PWD acknowledges this overlap by explicitly referring to private international law.<sup>67</sup> More implicitly, private international law plays a role in Article 3(1) PWD which states that:

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be interpreted according to the rules laid down in Rome I. In Rome I, Article 8 and 9 contain the rules for international employment contracts.

<sup>63</sup> The Rome I Regulation differs from the Rome Convention in its specific reference to the country *from* which the employee habitually carries out his work in the text of the provision. This phrase is added to adjust the conflict of laws rule to the interpretation given by the CJEU to the rule on jurisdiction in the Brussels I Regulation which (like Article 6 of the Rome Convention) merely refers to the habitual place of work. The CJEU interpreted this as including the situation in which the employee habitually works in more than one country, but does so from an identifiable centre of activities. Hence, the phrase refers to the base from which the worker operates and not to the country of establishment of the employer. See Case C-29/10, *Heiko Koelzsch* (CJEU 15 March 2011) not yet reported in ECR.

<sup>64</sup> However, it is not necessarily the case: neither the employee nor the employer has to be established in the country where the work is habitually performed. An example of the worker not living in the country where the work is performed is frontier work. An example of the employer not being established in the country of work would be the foreign correspondent working in country A for a newspaper or television station in country B. Compare also the case law on jurisdiction in individual employment disputes under the Brussels Convention and the Brussels I Regulation, especially Case C-125/92 *Mulox IBC/Geels* [1993] ECR I-4075; Case C-383/95 *Rutten v Cross Medical* [1997] ECR I-57; Case C-37/00 *Weber/Universal Ogden Services* [2002] ECR I-2013.

<sup>65</sup> See on the broad interpretation of Article 8(2), which limits the scope of Article 8(3), recently Case C-384/10 *Voogsgeerd* (CJEU 15 December 2011), not yet reported in ECR.

<sup>66</sup> Recently, preliminary questions on the interpretation of Article 8(4) have been posed by the Dutch Supreme Court. Pending Case C-64/12 *Schlecker* [2012] OJ C126/5. See Van Hoek, Houwerzijl (n 44), at 5.1

<sup>67</sup> See recitals 6–11 of the PWD.

Member States shall ensure that, *whatever the law applicable to the employment relationship* (emphasis added by the author), the undertakings referred to in Article 1(1) PWD guarantee workers posted to their territory the terms and conditions of employment covering the following matters...

Thus, it is made clear that the law applying to the labour contract is regulated by private international law (currently the Rome I Regulation), but the PWD superimposes — if necessary — the minimum protection of the law of the host state upon the protection already offered under the law applying to the contract by virtue of Article 8 Rome I.<sup>68</sup>

If we apply the PIL rules to migrant, frontier and seasonal workers (our categories 1a, 1b, 1c), Article 8 Rome I will always point to the *lex loci laboris*, being the law of the country where they habitually carry out their work in performance of the contract. In terms of outcome, this means that all mandatory laws and collective agreements in the receiving Member State are applicable to their contracts. Hence, in a system with relatively few mandatory and/or collectively agreed labour law standards, the equal treatment principle enshrined in Article 45 TFEU may suffer from the PIL rules.<sup>69</sup>

Regarding (genuinely) posted workers (our categories 2a, 2b, 2c), Article 8 Rome I points also to the law of the state where they habitually work, which creates the well-known unequal treatment with settled workers in the host state. Only with regard to the listed key areas may Article 3(1) PWD override this effect of Article 8(2), under the condition that host state law is more favourable (see Article 3(7)).<sup>70</sup>

## **6. Demarcating workers' mobility under Article 56 from movement of workers under Article 45 TFEU**

The different applicable labour law to the employment contracts of workers moving under Article 45 and Article 56 makes the need for clear and legitimate boundaries between the two regimes pertinent. One possible way of demarcating, emerging from the analysis above, is to take the (intended) duration of the labour mobility into account: is the move permanent or temporary? As we have seen, the rationale behind the 'status aparte' of posted workers in the PWD and in Rome I is that they only work 'temporarily' or 'for a limited period' in the host state. Notions such as 'habitual' in Rome I and 'permanent' in Regulation 492/2011 (recital 5) seem to contrast this with

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<sup>68</sup> Compare with the relationship between Rome I and the PWD: Commission, 'Green Paper on the conversion of the Rome Convention of 1980 on the law applicable to contractual obligations into a Community instrument and its modernization' COM (2002) 654 final, 36.

<sup>69</sup> The interference of PIL rules with the equal treatment postulate under Article 45 was also clearly visible in the draft Regulation on conflict of laws pertaining to employment relations within the Community (COM (76) 653 final), discussed by See Evju and Novitz (n 5) section 3.3.

<sup>70</sup> Within the meaning of better working conditions (more protection) for the employee.



the position of migrant workers, suggesting that they are employed on a more continuous base in the receiving state. But is that really and necessarily the case?

## 6.1 Categories involving ‘permanent’ movement under Article 45

Of the categories grouped under the free movement of workers (Article 45 TFEU), category 1a (permanent workers) clearly involves movement to another Member State with — intentionally — a permanent character (so without any foreseeable limit). In the archetypal situation the migrant worker will sign an employment contract with an employer in (or at least under the law of) the new country of employment, which will also be his new country of residence. In contrast, category 1c (frontier workers) refers to the situation on which a migrant worker will only change his place of work or his place of residence to the other Member State.<sup>71</sup> Probably, taking into account that the rules were made before the rise of atypical, more flexible forms of employment, also here the drafters had jobs with an open-ended character in mind.

However, nowadays many migrant and frontier workers may be employed on fixed-term contracts. In case law, it is established that also part-time workers, on-call workers and trainees qualify as workers within the meaning of Article 45 TFEU, as long as their work is of an economic nature and is not (too) marginal or ancillary.<sup>72</sup> In light of that case law, the fact that employment is of short duration cannot, in itself, exclude that employment from the scope of Article 45 TFEU. For instance someone who only worked on a temporary basis for two and a half months on the territory of another Member State than his state of origin, should be regarded as a worker within the meaning of Article 45 TFEU on condition that his activities are not purely marginal and ancillary.<sup>73</sup> Clearly, what was once referred to as ‘permanent’ movement of migrant workers nowadays includes many cross-border movements with very much a temporary (fixed-term) nature.

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<sup>71</sup> The situation of an EU national who, following the transfer of his residence from one Member State to another State, works in a Member State other than that of his residence falls, after that transfer, within the scope of Article 45 TFEU (Case C-527/06 *Renneberg* [2008] ECR I-7735, para 37).

<sup>72</sup> See, for example, Case 53/81 *Levin* [1982] ECR 1035; Case 139/85 *Kempf* [1986] ECR 1741; Case 66/85 *Lawrie-Blum* [1986] ECR 2121; Case C-357/89 *Raulin* [1992] ECR I-1027. See also Monika Schlachter, ‘Die Freizügigkeit der Arbeitnehmer in der Europäischen Union – Wer ist Träger dieses Rechts?’ (2011) ZESAR 160.

<sup>73</sup> Case C-413/01 *Ninni Orasche* [2003] ECR I-13187, paras 25 and 32. See also Case C-169/03 *Wallentin* [2004] ECR I-06443 and Case C-109/04 *Kranemann* [2005] ECR I-02421, regarding trainees one of whom only worked abroad several weeks, as discussed by Herwig Verschueren, ‘Cross-border workers in the European internal market: Trojan horses for Member States’ labour and social security law?’ (2008) 24 IJCL 176.

## 6.2 Categories involving ‘temporary’ movement under Article 45

Apart from the case law that broadened the coverage of categories 1a and 1c, the drafters of Regulation 1612/68 (now 492/2011) already referred in the text of recital 5 to one sort of employment relationship with an undoubtedly temporary character, namely seasonal work (category 1b). Also with regard to the forgotten category (1d), referring to those who pursue their activities for the purpose of providing services, it can be held that in 1968 the focus must already have been on *temporary* service provision abroad, although the underlying engagement in the habitual country of work was probably supposed to have an open-ended character.

In any event, it is crystal clear that Article 45 TFEU includes both categories of permanent and temporary movement. A finding which is in fact fully in line with its original purpose to cover all EU workers’ mobility. Hence, the (intended) duration as such cannot be deemed the distinguishing feature between the regimes for workers’ mobility. Still, ‘temporariness’ is an essential feature of workers’ mobility under Article 56 TFEU; In order to qualify as a worker within the meaning of Article 2 PWD, the person concerned must be posted for a limited period of time to a Member State other than the one in which he normally works. In Article 8(2) Rome Convention, the reference is again to ‘temporary’ employment. Below we take a closer look at what these notions exactly entail.

## 6.3 What is ‘temporary’ within the meaning of Rome I?

The definition of ‘temporariness’ was one of the most controversial issues in the debate on the transformation of the Rome Convention of 1980 into the Rome I Regulation. It turned out to be impossible to reach agreement on a definition of temporary posting in the text of the new regulation. However, some indications were included in the Preamble (recital 36),<sup>74</sup> which reads as follows:

As regards individual employment contracts, work carried out in another country should be regarded as temporary if the employee is expected to resume working in the country of origin after carrying out his tasks abroad. The conclusion of a new contract of employment with the original employer or an employer belonging to the same group of companies as the original employer should not preclude the employee from being regarded as carrying out his work in another country temporarily.

Whereas the first sentence limits the notion of posting, the second sentence actually expands the notion of posting.<sup>75</sup> In fact, the first narrowing sentence contributes to a clearer definition of posting in highlighting the

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<sup>74</sup> In the Commission Proposal COM(2005)650 final the specifications were contained in the relevant Article itself, rather than in the preamble.

<sup>75</sup> It can be traced to a proposal of the Groupe Européenne de Droit International Privé and caters for expatriates who, for reasons of immigration, might enter into a contract with an establishment in the country of posting while maintaining their contractual link with the original employer in the home country.

importance of a habitual place of work to return to.<sup>76</sup> The fact remains, however, that Rome I does not contain any specific limits as to the duration of the posting.

## 6.4 What is ‘temporary’ within the meaning of the PWD and Article 56?

For the three situations of posting (categories 2a, 2b, 2c) covered by the PWD, Article 1(3) states that there must be a link to a cross-border service provision that is temporary in nature. In fact, it is this relationship to a transnational service that distinguishes the posting of workers from other types of temporary work, such as seasonal work, discussed above in Section 6.2. Nevertheless, neither case law nor legislation based on Article 56 TFEU gives a workable definition of what is exactly meant by the phrase ‘temporary’. In *Rush Portuguesa* the CJEU stated that a service provider ‘may move with its own work-force which it brings from its own Member State for the duration of the work in question’.<sup>77</sup> Hence, the temporary character of posting seems to be linked to the duration of the service abroad. With the aim of preventing abuse and ‘creative’ use of posting, Article 3(6) PWD stipulates that the length of the posting shall be calculated on the basis of a reference period of one year from the beginning of the posting. Because there is no case law yet on the interpretation of this aspect of the PWD, it is not clear how Article 3(6) must be read in light of the ‘open’ reference in Article 2(1) to ‘a limited period of time’.

In the absence of specific case law, generally, reference is made to the interpretation in case law of what constitutes the temporariness of a service provision and how it should be distinguished from the exercise of the freedom of establishment. This includes in fact the distinction between our two categories of self-employed mobility: on a temporary basis in the context of services (category 2d) or permanently, in the context of establishment (category 3).

So far, in this general case law on services no limitation in time to the temporariness of a service provision has been accepted. A key element when determining whether the activities constitute a service or an establishment is whether or not the self-employed (company) is registered in the Member State where the economic activities in question are pursued.<sup>78</sup> Apart from that, as stated in *Gebhard*, the temporary nature of the activities has to be determined in the light, not only of the duration of the provision of the service, but also of its regularity, periodical nature or

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<sup>76</sup> This indicator is also included in Art. 3(2)(c) of the proposal on the enforcement of Directive 96/71 concerning the posting of workers in the framework of the provision of services, Brussels 21 March 2012, COM (2012) 131 final. See in more detail Van Hoek and Houwerzijl (n 44).

<sup>77</sup> *Rush Portuguesa*, paras 17 and 19.

<sup>78</sup> Case C-514/03 *Commission v Spain* [2006] ECR I-963, para 22. This paragraph draws on the paper by Erik Sjödin, ‘The restricting labour market. A developmental study of the case law on the interface between free movement and posting of workers’ (2009) FORMULA Working Paper 6, University of Oslo [www.jus.uio.no/ifp/english/research/projects/freemov/publications/presentations/may2009/sjodin.pdf](http://www.jus.uio.no/ifp/english/research/projects/freemov/publications/presentations/may2009/sjodin.pdf) accessed 13 August 2012, 10-12.

continuity.<sup>79</sup> In *Schnitzer*,<sup>80</sup> application of these criteria made the CJEU conclude that Article 56 TFEU includes services such as construction projects involving large building works which are provided over an extended period, even over several years. Whether it is relevant that this period of time concerns only a single project or may include several (consecutive) projects is not clear. At least, the fact that a company often provides the same service to the same Member States, and equips itself with some form of infrastructure in the host state(s) (including an office, chambers or consulting rooms) if such infrastructure is necessary for the purposes of performing the services in question, is not sufficient to deem him as being established there. On the other hand, the CJEU held in *Trojani* that an activity carried out on a permanent basis or without any foreseeable limit would not be considered a service within the meaning of Article 56 TFEU.<sup>81</sup> Also, it was ruled that a construction company exclusively focused on a different country than that of establishment cannot be considered a service provider by the CJEU.<sup>82</sup>

What lessons can be learned from this case law analysis? First, that in drawing the boundaries between Article 56 and Article 49 TFEU the temporal dimension of the cross-border economic activity pursued is a distinctive feature indeed.<sup>83</sup> This reveals an important difference with the boundaries between workers' mobility under Article 45 and Article 56, which, as we saw, are less straightforward. Second, it is noteworthy that the distinction between Article 56 and Article 49 is in reality difficult to operationalize. In the words of A-G Léger in his Opinion to *Gebhard*:

On the strictly legal level, this distinction is a tricky one, in so far as it is the upshot of a combination of criteria, closely depends on the factual circumstances in question and has never been precisely and systematically defined.

Although the non-limited, open character of the duration of posting certainly promotes the use of the freedom to provide services, it is at the same time problematic in light of the protection of workers. As Kilpatrick observes:<sup>84</sup>

Socially, it is not difficult to imagine that long-stretches of life in a (typically more expensive) host-state on a minimum skeleton of host-state labour standards can seem exploitative to posted workers and host-state inhabitants alike. Yet that is the effect of applying the new [post-Laval] approach in combination with the expanded area of application of Article 49 [now Article 56].

Undeniably, a long period of posting blurs the distinction between temporary posting under Article 56 and workers' movement under Article 45 TFEU. The fact that no (rebuttable) temporal limit restricts the duration of services and

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<sup>79</sup> Case C-55/94 *Gebhard* [1995] ECR I-04165, para 27; Case C-131/01 *Commission v Italy* [2003] ECR I-1659, para 22.

<sup>80</sup> Case C-215/01 *Schnitzer* [2003] ECR I-14847, para 30.

<sup>81</sup> Case C-456/02 *Trojani* [2004] ECR I-7573, para 28.

<sup>82</sup> This clearly follows from the judgment in Case C-404/98 *Phum* [2002] ECR I-9379, situated in the context of Regulation 1408/71.

<sup>83</sup> As shown by the very wording of Article 57 TFEU, in contradistinction to the permanent nature of the activity carried out by an economic operator who is established in a Member State (observation of AG Léger, Opinion in *Gebhard*, para 32).

<sup>84</sup> Kilpatrick (n 35), 27.

posting, clearly complicates the development of clear guidelines and hence of an enforceable<sup>85</sup> distinction between situations falling within Article 49 and Article 45, on one hand, vis-à-vis situations falling within Article 56, on the other hand. Remarkably, the expansive interpretation of ‘services’ in case law runs counter to the wording in Article 57 TFEU that the free movement of services is residual to the other fundamental freedoms.<sup>86</sup> According to Giesing:<sup>87</sup>

It can be safely assumed that, given the concept of the EC-Treaty, only short-time ‘temporary’ services would be covered by Article 49 EC [now 56 TFEU]. However, as the Court has decided to take a differentiating point of view within the freedom to provide services, there is no choice but to accept this.

On the other hand, law is never static; as time goes by, also contemporary interpretations will be modified and/or amended again. Actually, in current law there are two examples of temporal limitations to ‘services’ and ‘posting’, showing that the expansive approach discussed above is not carved in stone. One example, dating from the early days, is the temporal limit on affiliation to the social security system of the home state instead of the host state in case of *posting* as enshrined in Article 12 of Regulation 883/2004 on the coordination of social security schemes.<sup>88</sup> By uncoupling the duration of ‘posting’ from the duration of the ‘service’ this example seems to reflect the traditional approach to separate the status of the posted worker from the status of the service. If that is possible in the context of social security law, why not consider this also with regard to labour law?

The other example concerns the introduction of a time-limit on services in the context of the international transport sector: cabotage.<sup>89</sup> Cabotage operations consist of the provision of *services* by hauliers within a Member State in which they are not established. In line with the general case law on services cabotage operations may not be prohibited as long as they are not carried out in a way that creates a permanent or continuous activity within that Member State. Interestingly, in 2009, a temporal limitation was adopted which was motivated as follows: ‘In practice, it has been difficult to ascertain which services are permitted. Clear and easily enforceable rules are thus needed.’<sup>90</sup> Therefore, ‘the frequency of cabotage operations and the period in which they can be performed should

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<sup>85</sup> For more details on the complicated monitoring and enforcement of the PWD, see Chapter 6 of this book: Kerstin Ahlberg, Jonas Malmberg and Caroline Johansson, ‘Monitoring Compliance with Labour Standards: Restriction of economic freedoms or effective protection of rights?’ See also Van Hoek and Houwerzijl (n 22).

<sup>86</sup> See above text to n 53.

<sup>87</sup> Richard Giesen, ‘Posting: Social protection of workers versus fundamental freedoms’ (2003) CMLRev 155.

<sup>88</sup> In principle, during the first 24 months of posting, the worker remains affiliated to the social security system of the Member State where he normally works.

<sup>89</sup> Cabotage is limited to three operations within seven days. See European Parliament and Council Regulation (EC) 1072/2009 on common rules for access to the international road haulage market [2009] OJ L 300/72, art 8(2). See Van Hoek/Houwerzijl (n 44), text to n 54ff.

<sup>90</sup> Recital 15 of Reg 1072/2009.

be more clearly defined'.<sup>91</sup> Hence, this example highlights how concerns about the applicability and enforceability of the rules may lead the way to a less expansive approach.<sup>92</sup>

## 6.5 'Active' and 'passive' movement of workers

The analysis developed above demonstrates that the categories under Article 45 TFEU involving permanent movement also include temporary workers mobility, whereas the categories of temporary movement under Article 56 TFEU may in practice include situations that tend to have a more permanent character than desirable, especially from the viewpoint of workers' protection. Apart from two exceptions where a time-limit was enacted, both from an internal market perspective and from a private international law perspective the predominant notion of temporariness is still unclear and impractical: everything is left to an assessment on a case-by-case basis. Clearly, this does not help in creating 'sustainable' boundaries between the two legal regimes for workers' mobility within the EU.

It may therefore be more apt to put the (intended) duration of the labour mobility as a criterion aside and take the 'initiator' of the labour mobility as criterion: is it the employee, or the employer who initiates the cross-border movement of the employee? The former situation may be labelled 'active' movement, the latter situation 'passive' movement of workers. The reasoning is as follows: under Article 45 TFEU workers move actively to another Member State, which may be illustrated by the fact that they accept work and conclude an employment contract with an employer established in the state of destination or seek work in that state. These indicators seem to imply that such workers have access to the labour market of the state where they move for work. In contrast, under Article 56 TFEU, it is the employer in his capacity as service provider who actively uses his freedom to provide a service in another Member State from the one he is established in. If he needs employees to perform the service contract he has agreed upon with the recipient in the other Member State, the employer may post his own workers to that Member State to carry out the actual work that has to be done. A posted worker does, according to the CJEU, not seek access to the labour market of the host Member State, but will instead immediately return to the state where he normally works once the service is carried out. This passive movement (namely because the employer assigns him to) may be illustrated by the fact that the posted worker has concluded an employment contract with his employer governed

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<sup>91</sup> Ibid.

<sup>92</sup> If adopted, the proposal on the enforcement of Directive 96/71 concerning the posting of workers within the framework of the provision of services, Brussels 21 March 2012, COM (2012) 131 final, would be another example. On this proposal see in more detail Ahlberg et al. (n 85); Van Hoek and Houwerzijl (n 44).

by the law of the habitual country of work. Another indicator of passive movement, often used in the context of PIL, is the provision or reimbursement of travel, board and lodging costs by the employer.<sup>93</sup>

The distinctive criterion in this way of demarcating Article 45 mobility from Article 56 mobility is ‘labour market access’. However, a recent judgment of the CJEU in the joint cases of three Polish service providers against the Dutch Ministry of Social Affairs, sheds new light on the criteria constituting ‘labour market access’.

## **7. The special case of temporary agency work: the ‘labour market access test’**

### **7.1 From *Rush Portuguesa* to *Vicoplus***

In countries that imposed a transitional period for the free movement of workers, a particularly problematic point concerned the status of EU8/EU2 nationals who were posted to EU15 Member States as temporary agency workers. Belgium, Denmark, Luxembourg and the Netherlands considered posted agency workers (our category 2c) to be subject to the restrictions on the free movement of workers. This view was strongly opposed by other Member States (for example, Romania) and the European Commission.<sup>94</sup> Against the background of this controversy, in *Vicoplus*<sup>95</sup> it was asked whether the Dutch requirement of a work permit for making workers available within the meaning of Article 1(3)(c) PWD is compatible with the free movement of services.

According to the Commission the question had to be answered in the negative. This view was based on a rather formal argument, namely that a posted worker does not access the labour market of the receiving Member State *because* no labour agreement is entered into between this worker and the user undertaking (emphasis added by the author).<sup>96</sup> Admittedly, Article 1(3) PWD states that during the period of posting an employment relationship must exist between the temporary employment undertaking or the placement agency and the worker. However, in the PWD no connection is made between this requirement and gaining or not gaining access to the labour market of the host Member State. In fact, the PWD does not mention the term ‘labour market’ at all, which is logical in light of the fact that this Directive merely gives substance to the *Rush Portuguesa* judgment as regards the applicable labour standards from the host Member State.<sup>97</sup> Hence, Advocate General Bot argued that the PWD does not aim at bringing prejudice to the possibility for ‘old Member States’ to control or restrict the access of workers from the

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<sup>93</sup> This indicator is made explicit in Art. 3(2)(d) of the proposal on the enforcement of Directive 96/71 concerning the posting of workers in the framework of the provision of services, Brussels 21 March 2012, COM (2012) 131 final. See in more detail Van Hoek and Houwerzijl (n 44).

<sup>94</sup> See Van Hoek and Houwerzijl (n 22).

<sup>95</sup> Case C-307/09-309/09 *Vicoplus* [CJEU 10 February 2011] not yet reported in ECR.

<sup>96</sup> As referred to in the Opinion of AG Bot in *Vicoplus*, para 70.

<sup>97</sup> *Rush Portuguesa*, para 18. See above text at n 50.

new Member States to their labour market.<sup>98</sup> Therefore, the fact that the transnational making available of temporary workers was brought under the personal scope of the PWD does not preclude this type of activity also being within the scope of transitional provisions for the free movement of workers. Furthermore, the Advocate General qualified the making of a distinction according to whether a worker gains access to the labour market of the receiving Member State directly and independently or by means of a company that makes available workers as artificial:

Although the worker remains linked to his initial employer, it is true that the actual work is provided by the employer in the host Member State for the needs of his company and it is carried out under his control and direction. The worker made available is hired in the same way as a local worker and thus directly competes with local workers on the labour market of the receiving Member State, which inevitably has consequences for that market.

Moreover, it was put forward that this artificial line of reasoning does not take into account the specific nature of making temporary agency workers available nor the possible consequences thereof for the labour market of the host Member State.<sup>99</sup> The Advocate General thus took the side of the Dutch government that had invoked the *Rush Portuguesa* judgment in defence of its policy.

Why was this judgment from 1990 so crucial to the assessment of the *Vicoplus* case? As mentioned, in this ruling the CJEU considered that posted workers do not really leave the labour market of the Member State of origin, they remain part thereof and thus have no access to the labour market of the host Member State.<sup>100</sup> The French work permit arrangement was therefore deemed to be an unjustified obstacle to the free movement of services. Nevertheless, by way of reaction to a remark from the French government the CJEU had made one reservation:

... an undertaking engaged in the making available of labour, although a supplier of services within the meaning of the Treaty, carries on activities which are specifically intended to enable workers to gain access to the labour market of the host Member State.<sup>101</sup>

In later case law the Court never got back to this issue. And the inclusion of the cross-border hiring out of temporary agency workers in the scope *ratione personae* of the PWD, seemed an indication that this type of activity was exclusively brought within the reach of the free movement of services. Against this background, the referring national court wondered whether the reservation expressed in *Rush Portuguesa* still applied to the posting of temporary agency workers.

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<sup>98</sup> Opinion A-G Bot in *Vicoplus*, paras 54, 55, 52.

<sup>99</sup> *Ibid.*, paras 51, 70–71.

<sup>100</sup> *Rush Portuguesa*, para 15.

<sup>101</sup> *Ibid.*, para 16.



## 7.2 Temporary agency work is a provision of services that grants access to the labour market

The CJEU starts by confirming that (transnational) posting is a provision of a service, as was first established in *Webb*.<sup>102</sup> In that case, the CJEU acknowledged that:

such activities may have an impact on the labour market of the Member State of the party for whom the services are intended. First, employees of agencies for the supply of manpower may in certain circumstances be covered by the provisions of Articles 45 TFEU to 48 TFEU and the European Union regulations adopted in implementation thereof (see *Webb*, paragraph 10). Secondly, owing to the special nature of the employment relationships inherent in the making available of labour, pursuit of that activity directly affects both relations on the labour market and the lawful interests of the workforce concerned (para 18).<sup>103</sup>

It was in this respect that the Court had made its remark in *Rush Portuguesa*, already quoted above, that an undertaking engaged in the making available of labour, although a supplier of services within the meaning of the TFEU, carries on activities which are specifically intended to enable workers to gain access to the labour market of the host Member State. In *Vicoplus* the Court confirms this line of reasoning. Indeed, while being hired out to the user undertaking the worker is ‘typically’ assigned to a post that would otherwise have been occupied by a person employed in that undertaking. During the transitional period, which aims at regulating access to the labour market, the requirement of a work permit for, in this case, Polish temporary agency workers can be justified as a measure allowed on the basis of the Act of Accession and is therefore compatible with the free movement of services. This is in line with the purpose of the transitional provisions, which aim to avoid entirely opening up the labour market immediately.<sup>104</sup>

Noteworthy, the CJEU explicitly embraced the objective reasoning the Advocate General had used in the matter; namely that it would be artificial to draw a distinction with regard to the influx of workers on the labour market of a Member State according to whether they gain access to it by means of transnational making available of labour or whether they gain access to it directly and independently. Indeed, in both cases, the potentially large movement of workers can disturb the labour market. The exclusion of posted temporary agency workers from the transitional regime would therefore be liable to deprive the effectiveness of the provisional measure.<sup>105</sup>

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<sup>102</sup> Case C-279/80 *Webb* [1981] ECR 3305, paras 9, 27. See also Case C 298/09 *RANI Slovakia* [2010] ECR I-81, para 36.

<sup>103</sup> *Vicoplus*, paras 2829.

<sup>104</sup> *Ibid.*, paras 38-40. See also Opinion AG, paras 56-57.

<sup>105</sup> *Ibid.*, paras 34-35.

### 7.3 The impact of *Vicoplus* on demarcating ‘Article 45’ from ‘Article 56’ workers’ mobility

It is apparent from *Vicoplus* that the distinction between workers’ mobility on the basis of the free movement of workers and on the basis of the free movement of services remains troublesome. The CJEU has now explicitly confirmed that both freedoms are involved with respect to transnational temporary agency work (category 2c). This conclusion had been hovering ‘in the air’ for twenty to thirty years, given the considerations about the specific nature of temporary work in *Rush Portuguesa* and *Webb*. The reasoning in *Vicoplus* is consistent: an undertaking making labour available may be a provider of services within the meaning of Article 56 TFEU but carries out activities that aim at providing workers access to the labour market of the host Member State (the so-called allocation function). Indeed, whether foreign workers are hired by a company in the host state or are made available there through a foreign undertaking making a posting, in both cases they fill a vacancy on the labour market of the country of destination that could otherwise have been assigned to a resident worker.

Interestingly, *Vicoplus* and the other Polish service providers involved in the *Vicoplus* case disputed that they were hiring-out workers only. Allegedly, their posted workers carried out activities that pertained to the core business activities of the companies. Hence, they took the stance that posting of category 2a (in the framework of contracting of work) was at issue, not posting of category 2c. In view of this, the referring court wondered which criteria must be used to determine whether hiring-out of workers is at stake (second question).

In its answer, the CJEU explained that the said provision of service is characterized by (1) the fact that the movement of the posted worker to the host Member State constitutes the very purpose of the provision of services and that (2) this posted worker carries out his tasks under the control and management of the user undertaking.<sup>106</sup> In contrast, in a relationship of subcontracting, our category 2a (as referred to in *Rush Portuguesa* and in Article 1(3)(a) PWD), there is no transfer of authority as regards the carrying out of the tasks assigned to the workers.<sup>107</sup> Moreover, in the event of category 2a posting, the movement of the workers is secondary and ancillary to a provision of service of a different nature, in the construction sector for instance, whereas with category 2c posting, the (main) purpose of the provision of services is the movement of the workers to another Member State.<sup>108</sup> Therefore, the CJEU concludes that in respect of category 2c posting, it is not relevant whether the worker returns to his Member State of origin at the end of the period of employment elsewhere. The return does not preclude the worker having been made available in the host Member State.<sup>109</sup>

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<sup>106</sup> *Ibid.*, para 51.

<sup>107</sup> *Ibid.*, Opinion AG, para 64.

<sup>108</sup> *Ibid.*, paras 45-46.

<sup>109</sup> *Ibid.*, para 49. The Advocate General’s phrasing is less cryptic: the circumstance that temporary agency workers return to their Member State of origin at the end of the posting is less important than the fact that they have held

The CJEU also observed that there are situations in which the main activity of the service provider and the tasks carried out by the worker in the host Member State do not correspond. The employee may carry out a task related to secondary or new activities of that employer. Conversely, another main activity of the employer does not preclude that the posted worker has been made available in compliance with the characteristics of category 2c posting as defined by the CJEU. This circumstance is mainly relevant for intra-group posting (our category 2b).<sup>110</sup> With this remark the Court seems to support the Dutch government's line of reasoning that category 2b posting in principle too aims at moving workers to another Member State. Hence, the *Vicoplus* ruling draws a clear distinction, between, in the words of the CJEU:

on the one hand, the making available of workers and, on the other, a temporary movement of workers who are sent to another Member State to carry out work there as part of a provision of services by their employer (see, to that effect, *Rush Portuguesa*, paragraph 15).

The conclusion seems to be that the latter group is still assessed as moving exclusively under Article 56 TFEU. However, regarding the former group it is emphasized that their movement is (also) covered by Article 45 TFEU, whereas their employer at the same time makes use of his right to free service provision enshrined in Article 56 TFEU.

## 7.4 The importance of the *Vicoplus* judgment from a labour law perspective

In contrast to the *Rush Portuguesa* judgment, the *Vicoplus* judgment gives no clue about the consequences of the new distinction between the different categories of posting in terms of labour law. I hold the view that the judgment should — at least — have consequences for the unequal treatment in terms of working conditions which were hard to justify before that as well, between temporary agency workers hired-out through a foreign TWA and through a domestic TWA. When, for example, a TWA recruits Polish workers for jobs in Sweden, the actual circumstances may not change according to whether the TWA is Polish or Swedish, but the legal situation does. Pursuant to article 3(1) PWD the former group is only entitled to a hard nucleus of working conditions as laid down in legislation and in generally binding collective labour agreements in the host Member State, whereas the latter group is entitled to the entire package.<sup>111</sup>

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posts, even temporarily, which have actually been offered by an undertaking in the host Member State and that they therefore entered the labour market of that state for a certain period.

<sup>110</sup> Ibid., para 50.

<sup>111</sup> The different entitlements of both groups of temporary agency workers not permanently resident in the host country are perfectly illustrated by the rules laid down in Dutch Collective Labour Agreement for Temporary Agency Workers 2009–2014. See Article 44, 44a, 45, 46 and Appendix IV, < <http://www.abu.nl/publicaties/cao> > accessed 13 August 2012. A difference is made between the rules applying to temporary agency workers who are recruited outside the Netherlands but who are working under an employment contract with a Dutch TWA and temporary

As is well known, amending the PWD is a (too) sensitive matter in terms of politics. Nonetheless, Member States can put a stop to the unequal treatment of posted agency workers and agency workers made available through a domestic TWA. They can use the option available to them in virtue of Article 3 (9) PWD to determine that posted temporary agency workers must be employed under the same terms and (working) conditions as domestic temporary agency workers. Thus enabling fully equal treatment of temporary agency work with respect to labour standards, regardless of the place of establishment of the temporary employment undertaking and the place where the work contract with the temporary agency worker was entered into, is valid in terms of substance and also in line with the temporary agency work directive which had to be implemented on 5 December 2011 at the latest.<sup>112</sup>

Pursuing this pragmatic line of reasoning a little further, it is noteworthy that no action of the European legislator is required either to grant posted agency workers entitlements as fleshed out in Article 7 of Regulation 492/2011.<sup>113</sup> Hence, it would be interesting to see whether the acknowledgement that our category 2c is (also) governed by Article 45 TFEU can bring the forgotten category 1d (partially) back to life. In fact, as quoted above, in *Vicoplus* the CJEU re-affirmed that agency workers may be covered ‘by the provisions of Articles 45 TFEU to 48 TFEU and *the European Union regulations* adopted in implementation thereof’ (emphasis added).<sup>114</sup> To test what hidden promises are behind this phrase, there is first and foremost a need for posted workers who dare to claim such (hypothetical) rights before the court. Actually, they may be inspired by a recent judgment in the context of another Regulation that fleshes out the free movement of workers: Regulation 1408/71. In *Hudzinski and Wawrzyniak*<sup>115</sup>, the claim of a posted worker on a tax-related benefit scheme in the host state was rewarded by the CJEU.

Embedded in a brief survey on how the boundaries between Article 45 and Article 56 TFEU are drawn with regard to the position of posted workers under social security law, this judgment is examined below.

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agency workers who are deployed from abroad by a foreign private employment agency to a user company in the Netherlands, and whose employment contract is governed by the law of a country other than the Netherlands.

<sup>112</sup> Directive 2008/104/EC of the European Parliament and of the Council on temporary agency work, for more details see Chapter Nine of this book: Monika Schlachter, ‘Equal Treatment for Transnational Temporary Agency Workers?’

<sup>113</sup> See in more detail above, text to n 57.

<sup>114</sup> Above, text at n 102.

<sup>115</sup> Joined cases C-611/10 and C-612/10 *Hudzinski and Wawrzyniak* [CJEU 12 June 2012] not yet reported in ECR, para 68.

## 8. The position of posted workers under social security law

The (original) intention to include posted workers in the scope of the free movement of workers, is clearly visible in (the legal basis of and the case law based on) Regulation 883/2004 and its predecessor Regulation 1408/71.<sup>116</sup> Nevertheless, a closer look at the sparse case law related to this subject reveals a subtle but unmistakable interference of the law in the free provision of services with the law related to the free movement of workers.

As a general rule, laid down in Article 12 of Regulation 883/2004, for postings up to 24 months, the posted worker remains affiliated to the social security system of his normal country of employment and he and/or his employer will continue to pay contributions into that system. This ‘posting provision’ is a derogation from the main rule in the Regulation, which is the state of employment principle (*lex loci laboris*).<sup>117</sup> Originally, in *Manpower*, an early case of 1970 on the posting of temporary agency workers, the CJEU stated that the posting provision:

aims at overcoming the obstacles likely to impede *freedom of movement of workers* and at encouraging economic interpenetration whilst avoiding administrative complications for workers, undertakings and social security organizations (emphasis added).<sup>118</sup>

Thirty years later, in *FTS* and *Plum*, the CJEU expressed the rationale behind the posting provision, as follows:<sup>119</sup>

the aim is *to facilitate the freedom to provide services* for the benefit of the employers which post workers to Member States other than that in which they are established, *as well as freedom of workers* to move to other Member States. These provisions also aim at overcoming the obstacles likely to impede *freedom of movement for workers* and also at encouraging economic interpenetration whilst avoiding administrative complications, in particular for workers and undertakings (emphasis added).<sup>120</sup>

Hence, in the latter rulings, the CJEU amends the rationale behind the posting provision with reference to the free movement of services, while upholding the (principal) link to the free movement of workers.

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<sup>116</sup> According to settled case law the provisions of Regulation 1408/71 must be interpreted in light of the purpose of Article 48 TFEU, which is to contribute to the establishment of the greatest possible freedom of movement for migrant workers. See, inter alia, Case C-388/09 *da Silva Martins* [2011] not yet reported in ECR, para 70.

<sup>117</sup> See also *Evju* and *Novitz* (n 5)

<sup>118</sup> Case 35/70 *Manpower v Caisse Primaire d'Assurance Maladie, Strasbourg* [1970] ECR 1251, para 10.

<sup>119</sup> For posting longer than two years the general rule is that the worker has to be affiliated to the social security system in the country where he is posted although there are possible exceptions. For a combined account of labour and social security implications of posting, see Herwig Verschueren (n 73) 187-195.

<sup>120</sup> Case C-202/97 *FTS* [2000] ECR I-883, para 28; Case C-404/98 *Plum* [2000] ECR I-09379, para 19, under reference to Case 35/70 *Manpower v Caisse Primaire d'Assurance Maladie, Strasbourg* [1970] ECR 1251, para 10.

Notably, in the context of social security law, relying on both freedoms concurrently is fairly unproblematic if we limit our analysis purely to the interests of posted workers and their employers.<sup>121</sup> Generally, their interests seem to coincide: during short postings, it is usually more attractive for a worker to remain affiliated to the social security system of the country where he normally works than to interrupt this in return for acquiring only small benefits rights under the system of the host country. The complications which a change in the applicable social security legislation may entail could arguably have the effect of deterring a posted worker from exercising his right to free movement of workers. Self-evidently, for the employer, continuation of his contributions to the system of the country of origin is attractive because it avoids costs and administrative complications which might arise as a result of a change in the applicable national legislation.<sup>122</sup>

Remarkably, the *Hudzinski and Wawrzyniak* judgment shows how posted workers may despite their affiliation to sending state law, under circumstances still benefit<sup>ing</sup> from non-contributory benefit schemes in the host state where this does not conflict with the interests of their employers in exercising the freedom to provide services. *Hudzinski and Wawrzyniak* involves two Polish nationals who were respectively posted and seasonally employed in Germany. Under German law, a person who is not permanently or habitually resident in Germany is entitled to child benefits if he is subject to unlimited income tax liability in Germany. After having requested that they be made subject to unlimited income tax liability in Germany, both workers applied for child benefit of €154 per month per child to be paid for the period during which they worked in Germany.<sup>123</sup> Their requests were refused on the ground that Polish law instead of German law had to apply, in accordance with Regulation 1408/71.

The CJEU ruled that EU law does not prevent Germany from granting both workers child benefits although it is not, in principle, the competent Member State under Regulation 1408/71.<sup>124</sup> Earlier, in *Bosmann* the CJEU had already decided that Germany, even if it is not competent under Regulation 1408/71, has nonetheless the power to grant family allowances to a migrant worker under national law.<sup>125</sup> However, unlike the facts in *Bosmann*, Mr Hudziński and Mr Wawrzyniak had not suffered any legal disadvantage by reason of their temporary work in Germany because they remained entitled to family benefits of the same kind in the competent Member State (Poland). Also unlike *Bosmann*, neither they nor their children habitually resided within the territory of Germany. So in essence the question was whether the judgment in *Bosmann* would also hold for posted and seasonal workers. The CJEU

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<sup>121</sup> From the viewpoint of social security institutions (indeed referred to in the cited paragraph from *Manpower* but left out in *FTS* and *Plum*), proper control of the posting provision is extremely problematic and so is the combatting of ‘social dumping’. See Verschueren (n 73), 190-195.

<sup>122</sup> In *Seco*, the CJEU considered legislation that imposed social security contributions on foreign service providers indirectly discriminatory because these contributions did not lead to any social advantage for their posted workers. See Case C-62/81 [1982] ECR 223. See also Mijke Houwerzijl, Frans Pennings, ‘Double charges in case of posting of employees: the Guiot judgment and its effects on the construction sector’ (1999) 1 EJSS 93.

<sup>123</sup> According to the information in this case, the Polish child benefits amounted to approximately 12 euros per month.

<sup>124</sup> *Hudzinski and Wawrzyniak*, para 68.

<sup>125</sup> Case C-352/06 *Bosmann* [2008] ECR I-3827, para 32.

answered in the affirmative, reasoning that the differences with Bosmann were of less importance than the fact that the granting of German child benefits would contribute to improving the living standards and conditions of employment of the two Polish (posted) workers,<sup>126</sup> and hence to the free movement of workers.

Germany had argued that it would not be in line with the rationale behind the ‘posting provision’ in Regulation 1408/71 to grant German child benefit in this situation. Pointing to the fact that the receipt of the German child benefit was not in any way made dependent on employers’ obligations such as contributions or administrative formalities, the CJEU rejected this stance; the applicability of the German child benefit scheme to a posted worker would not complicate the exercise of the freedom to provide services by his employer.<sup>127</sup>

The possible impact of this judgment for posted workers depends first on the existence of similar non-contributory benefit schemes that do not require permanent or habitual residence,<sup>128</sup> and second on the creativity and empowerment of posted workers to find and claim such benefits. Perhaps some of these benefits could also or even rather be classified as a social or tax advantage under Article 7(2) of Regulation 492/2011. In light of the *Vicoplus* judgment which clearly ‘repairs’ the link between posted agency workers and the free movement of workers, it would be extremely interesting to see what would happen if such a worker tried to claim eligibility with reference to recital 5 of Regulation 492/2011.

## **9. Resetting or transcending blurring boundaries? A summarizing conclusion**

With a view to enlarging on the scope and perspectives dealt with in Chapter 2, this chapter identified and examined the different regulatory regimes under which labour, in particular employed labour, can move across borders within the EU. EU nationals may look for work in other Member States, using their right to free movement of workers, go there as self-employed or be posted by an employer in their home state. These modalities are governed by three legal regimes. The differences in labour costs and labour mobility opportunities attached to the regimes, triggered a process which may be labelled ‘regime shopping’. The crucial role of private international law in this development was highlighted.

A central theme in the legal analysis was the blurred demarcation between the movement of migrant workers under Article 45 TFEU and the movement of posted workers under Article 56 TFEU. An exploration of the original setting of the boundaries between Article 45 and Article 56 revealed that once all EU workers, including posted workers, were meant to be covered by Article 45. Subsequently, *Rush Portuguesa* and the PWD changed the original setting, by replacing the movement of posted workers under Article 56. After analysing the setting and resetting of boundaries, we turned to the (possible) criteria underpinning the new demarcation line.

One way of demarcating is the (intended) duration of labour mobility: is the move of a permanent or of a temporary character? However, it was observed that this criterion fails to clarify the boundaries. In fact, Article 45 TFEU includes both permanent and temporary workers’ mobility, whereas the categories of temporary movement under Article 56 TFEU may in practice include situations that tend to have a more permanent character than desirable, especially from the viewpoint of workers’ protection. Also,

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<sup>126</sup> *Hudzinski and Wawrzyniak* para 57, under reference to the purpose of Art. 48 TFEU and the first recital in the preamble to Regulation 1408/71.

<sup>127</sup> *Hudzinski and Wawrzyniak*, para 82–85.

<sup>128</sup> Especially tax-based criteria might be relatively easy to fulfil. In case of postings beyond 183 days income tax has often to be paid in the country where the worker is posted.

both from an internal market perspective and from a private international law perspective the predominant notion of ‘temporariness’ is still unclear and impractical: everything is left to an assessment on a case-by-case basis without any (rebuttable) limitations in time. Clearly, this does not help in creating ‘sustainable’ boundaries between the two legal regimes for workers’ mobility within the EU.

Another way is to take the ‘initiator’ of the labour mobility as leading criterion: is it the employee, or the employer who initiates the cross-border movement of the employee? The former situation may be labelled ‘active’ movement, the latter ‘passive’ movement of workers. As was clarified in *Vicoplus* the feature distinguishing between active and passive movement of workers is not the place where they sign their employment contract, but whether they have access to the labour market in the host state. In this respect, the CJEU confirmed that posted agency workers join the labour market of the host country, which implies that Article 45 TFEU is involved, notwithstanding their employment contract with a foreign TWA. An undertaking engaged in the making available of labour, although a supplier of services within the meaning Article 56/57 TFEU, carries on activities that are specifically intended to enable workers to gain access to the labour market of the host Member State. Indeed, while being hired out to the user undertaking the worker is ‘typically’ assigned to a post that would otherwise have been occupied by a person employed in that undertaking. Importantly, the posted agency worker carries out his tasks under the control and management of the user undertaking.

From *Vicoplus* a new distinction between these ‘labour-only’ posted workers and workers posted ‘secondary and ancillary to the service’ seems to emerge. This two-tier distinction clearly deviates from the categorization laid down in Article 1(3) PWD. Article 1(3) of the Posting Directive defines *three* situations of posting within the framework of the provision of services: (a) the sub-contracting of workers (for example in the construction sector), (b) intra-concern or intra-group secondments (the expatriation of workers, for example key personnel ) and (c) the cross-border hiring out of workers by temporary employment agencies.

As confirmed in *Vicoplus*, the first group is still deemed to be covered exclusively by Article 56 TFEU as it embodies the archetypical *Rush Portuguesa* posting: the service provider moves with his workforce for a short period to the host state to carry out a service. There is no transfer of authority as regards the carrying out of the tasks assigned to the workers, and the movement of the workers is secondary and ancillary to a provision of service of a different nature, in the construction sector for instance. In my view, to strengthen the rationale behind passive movement, it would be best to make reimbursement of travel costs obligatory for these ‘genuine’ posting situations.

Regarding the third group of posted agency workers, I hold the view that their link to Article 45 TFEU as established in *Vicoplus* cannot be without consequences for their labour law position. It is difficult if not impossible to legitimate the unequal treatment between posted agency workers and agency workers under contract in the host state. Looking for a solution, from a dogmatic point of view, deleting Article 1(3)(c) PWD or broadening of the legal base of the PWD with Article 45 TFEU would be interesting options. However, in the current political ‘stalemate’ with regard to the PWD, these options must be rejected as nostalgic and/or utopian. Instead, it may be best to ‘transcend’ the effect of the boundaries, by choosing a pragmatic piecemeal approach. First and foremost, the option to impose host state law in full, as laid down in Article 3(9) PWD should be used. This will close the gap in labour standards between both groups of agency workers, that being a solution which also fits with Article 5 of the temporary agency directive. Second, it was considered whether the pragmatic solution could also include entitlements under Regulation 492/2011. Theoretically, this may be conceivable, but in practice, all depends on an active litigation strategy of (or on behalf of) posted agency workers. In search of inspiring examples, we made a short excursion to the position of posted workers under Regulation 1408/71 and Regulation 883/04 on the coordination of social security law. Interestingly, in this context, a posted worker was recently rewarded for his efforts to claim host state tax-related benefits. In *Hudzinski and Wawrzyniak*, the CJEU opened the door for granting non-contributory benefits to posted workers in



the host state although this is not, in principle, the competent Member State under Regulation 1408/71. In this judgment, the CJEU emphasized that the granting of such benefits would contribute to improving the living standards and conditions of employment of the posted worker, and hence to the free movement of workers, whereas it does not conflict with the interests of their employers in exercising the freedom to provide services.

What about the second group of intra-concern posting? In *Vicoplus* the CJEU also observed that there are situations in which the main activity of the service provider and the tasks carried out by the worker in the host Member State do not correspond. In the words of the CJEU, another main activity of the employer does not preclude that the posted worker has been made available in compliance with the characteristics of the third category of posting. Hence, with regard to the second category host state authorities should be encouraged to investigate whether allegedly intra-concern posting is in reality used to make labour available. If so, the workers concerned should ideally be ‘relabelled’ posted agency workers. Although the CJEU gave no clue on that, in my view the same approach would be sensible with regard to alleged situations of subcontracting (the first category), whereas in reality labour-only subcontracting is at stake.

True enough, this pragmatic piecemeal approach will be neither quick, nor make it easier to explain the boundaries between workers’ mobility under Article 45 and Article 56 TFEU, because they remain as complicated. Also, some loose ends remain, such as the problem of the, in practice unlimited, duration of posting. However, the biggest advantage of the pragmatic approach, if effectively applied and enforced, would be a loss of interest in ‘regime shopping’ on the demand side because that would not be so lucrative anymore. Hence, the piecemeal approach may help to restore ‘fair competition’ on the internal market for services. That may be assessed as an important step in the right direction, at least if we agree with Däubler that:<sup>129</sup>

‘competition based on better performance’ and ‘competition based on worse working conditions,’ are two different things in reality within the meaning of the Treaty; they are not on an equal footing. The first one is a fundamental principle of the Community, the second one is potentially in contradiction with legal principles of the EC and therefore a ‘revocable’ phenomenon.’

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<sup>129</sup> Wolfgang Däubler, ‘Posted Workers and Freedom to Supply Services’, ILJ 1998, 266.